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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant : Kirby W. Reese
Serial No. : 10/715,240
Filed : 11/14/2000
Confirmation No. : 4992
Title : TEMPORARY PLATFORM OR ROADWAY AND
METHOD OF ASSEMBLING SAME
Art Unit : 3671
Examiner : Raymond W. Addie
Atty Docket No. : 18244-108780
Date : January 11, 2007

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APPEAL BRIEF

Dear Sir:

This appeal is from the Examiner's final Office Action mailed September 9, 2006 in which all pending claims (namely, Claims 27-46) were rejected and all such Claims are now appealed herein. Accordingly, Appellant timely submits herewith his brief pursuant

to the Notice of Appeal timely filed November 9, 2006 and received by the USPTO on November 13, 2006. The filing fee for the appeal brief of \$250.00 for a small entity pursuant to 37 C.F.R. §41.20 is submitted herewith by way of a credit card payment submission. The submission of this brief is due by January 13, 2007 – two-months from the receipt by the USPTO of the abovementioned Notice of Appeal.

1. Real Party in Interest

The real party in interest is an individual, Kirby W. Reese, a citizen of the United States whose residence is located in Mercersburg, PA and whose mailing address is 9486 Buchanan Trail West, P.O. Box 298, Mercersburg, PA 17236.

2. Related Appeals and Interferences

There are no prior or pending appeals, interferences or judicial proceedings relating to this appeal, or which may directly affect, or be directly affected by, or having a bearing on, the Board's decision in this appeal.

3. Status of Claims

Claims 1-26 have been cancelled and Claims 27-46 are pending, rejected, and are now appealed. Appellant has provided herewith certain amended claims identified as such which have not been entered by the Examiner as of the date of mailing of this paper.

4. Status of Amendments

Amendments after final rejection are *concurrently* being submitted on the same day (i.e., January 11, 2007) via USPS Express Mail to the USPTO in form of a response to the final Office Action and a copy of the claims submitted therein is provided herewith in the Claims Appendix wherein changes are shown in redline. As of the date of this appeal brief, none of these amendments have been entered by the Examiner. Claims 27, 30, 34, 39, 43, and 45 have been amended by Appellant in the response to the final rejection either for the purposes of putting the claims in better form for appeal and/or, as required by the Examiner as stated in the final rejection, and/or, should the Examiner enter any of the requested amendments before the appeal is heard, then the purpose shall be removing at least one or more claims from review on appeal. The modifications to these above-mentioned claims are shown in redline where text has been added and strikeout where text has been deleted.

5. Summary of Claimed Subject Matter

This invention relates to a method and apparatus for creating a temporary (i.e., portable) roadway apparatus or platform in wetlands, marshlands and other soggy and or

wet areas, and in particular for enabling the transport of heavy equipment across said areas by way of using said method and said apparatus.

Independent Claim 27 (and Dependent Claims 28-35)

Independent Apparatus **Claim 27** (from which Dependent Claims 28-35 depend, indirectly or directly) recites a portable roadway comprising a support layer and a traffic layer. More specifically, **Claim 27** recites that the support layer has a wire mesh top surface and that the layer comprises a plurality of multi-compartmental wire mesh gabions which substantially contain a filler material having a density less than that of water. Further, **Claim 27** recites that the traffic layer is supported by the top surface and further comprises a plurality of wood and/or metal panels. In particular, as also recited by **Claim 27**, the removeable panels are placed on the top surface; accordingly, equipment may be placed on the panels. Moreover, as further recited in **Claim 27**, the resulting portable roadway (which comprises of the above-mentioned support and traffic layers) has sufficient strength to support construction vehicle traffic.

The above-mentioned filler material within the gabion compartment may contain, as recited in Dependent **Claim 28** (which directly depends from Independent Claim 27), expanded polystyrene foam. Further, the filler material may be encapsulated in a fabric wrapper as recited in Dependent **Claim 29** (which directly depends from Independent Claim 27). The fabric wrapper, as recited in Dependent **Claim 30** (which depends from Dependent Claim 29 and indirectly from Claim 27), may be polypropylene yarn.

The above-mentioned filler material may occupy at least one gabion compartment and may take the form of a single block as recited in Dependent **Claim 31** (which directly depends from Independent Claim 27). At least one of the gabions in the portable roadway apparatus may be a mattress gabion as recited in Dependent **Claim 32** (which directly depends from Independent Claim 27). Furthermore, the wire mesh of at least one of the gabions may be coated with polyvinylchloride ("PVC") as recited in Dependent **Claim 33** (which directly depends from Independent Claim 27).

The panels which serve as a support for equipment or construction vehicle traffic may, as recited in **Claim 34** (which directly depends from Independent Claim 27), consist of wood panels, metal panels, or a combination thereof. Moreover, the panels, as recited in **Claim 35** (which directly depends from Independent Claim 27), may interlock with one another.

Independent Claim 36 (and Dependent Claims 37-44)

Independent Apparatus Claim 36 is directed to a portable platform which recites the same elements as recited above for Independent Apparatus Claim 27 (directed to a portable roadway). With this caveat in mind, Dependent Claims 37-44 recite the same elements as the above-mentioned Dependent Claims 28-34 (which directly or indirectly depend from Independent Claim 27).

Independent Claim 45 (and Dependent Claim 46)

Independent Method Claim 45 is directed to constructing a portable roadway or a portable platform. Claim 45 recites substantially the same elements as in Independent Apparatus Claim 27 (directed to a portable roadway) and Independent Apparatus Claim 36 (directed to a portable platform) with the appropriate verbiage for a method claim (e.g., use of gerunds and the like) such that the assembly of a portable roadway or portable platform is provided to one of ordinary skill in the art in a step-wise (i.e., method) fashion.

Further, Dependent Claim 46 (which directly depends from Independent Claim 45) further recites the construction steps for the portable roadway or portable platform which comprise of substantially the same elements as recited in Dependent Claims 28-29 (both of which directly depend from Independent Claim 27) and Dependent Claims 37-38 (both of which directly depend from Independent Claim 36) – that is, the method further involves the encapsulation of expanded polystyrene foam which is a step that is performed prior to placing the expanded polystyrene foam into one of the gabion compartments.

6. Grounds of Rejections to be Reviewed on Appeal

- A. Claims 27-32, 34-41, 43-36 under 35 USC 103(a) stand rejected over U.S. Patent No. 4,726,708 to Papetti in view of U.S. Patent No. 5,200,261 to Taguchi et al.
- B. Claims 33 and 42 under 35 USC 103(a) stand rejected over U.S. Patent No. 4,726,708 to Papetti in view of U.S. Patent No. 5,200,261 to Taguchi et al., and in further view of U.S. Patent No. 5,636,938 to Ragazzo

7. Argument

- A. The rejection of Claims 27-32, 34-41, 43-36 under 35 USC 103(a) over U.S. Patent No. 4,726,708 to Papetti in view of U.S. Patent No. 5,200,261 to Taguchi et al. is contested.

Appellant respectfully acknowledges that the Examiner has rejected Claims 2732, 34-41, and 43-46 under 35 U.S.C. §103(a) as being unpatentable over US Patent No. 4726708 to Papetti ("Papetti"), in view of U.S. Patent No. 5,200,261 to Taguchi ("Taguchi").

Inapplicability of Papetti

However, the Examiner's characterization of Papetti (provided herewith as Appendix A) as disclosing "a temporary road and a method of making" the same is not founded. Nowhere in Papetti is there a teaching, suggestion, or motivation to use the mattress-type gabion as a temporary roadway or platform, let alone the method for making such a temporary roadway or platform.

Instead, Papetti provides for a "mattress-type gabion for use as a covering...for preventing soil erosion caused by surface water and infiltration, and for consolidating soil against landslides...[caused by a plurality of reasons including]... road construction...."

Therefore, while "road construction" is *incidentally* referred to, it is just one example, among others provided in Papetti, which relates to the problem of landslides and the need for soil reinforcement by way of the mattress-type gabion system.

Accordingly, the use of Papetti as a primary reference in view of 35 U.S.C. §103(a) was improper.

Invention Distinguished from Papetti

Additionally, to further distinguish Appellant's Claims 27-32 and 34-35 as rejected by the Examiner in view of 35 U.S.C. §103(a), Appellant respectfully emphasizes that: Independent Claim 27 is directed to a portable roadway, unlike Papetti for the above-mentioned reasons.

Claims Distinguished from Papetti

Moreover, Dependent Claims 28-32 and 34-35, which directly or indirectly depend from Independent Claim 27, have the following additional distinguishing aspects: Claim 28 (filler material is expanded polystyrene foam); Claim 29 (filler material is encapsulated in a fabric wrapper); Claim 30 (fabric wrapper is polypropylene yarn); Claim 31 (filler material in at least one of the gabion compartments is in the form of a single block); Claim 32 (the gabion is a mattress gabion); Claim 34 (at least one of the panels is either a wood or metal panel or a combination thereof); and, Claim 35 (at least some of the panels are interlockable with one another).

Additionally, to further distinguish Appellant's Claims 36-41 and 43-44 as rejected by the Examiner in view of 35 U.S.C. §103(a), Appellant respectfully emphasizes that Independent Claim 36 is directed to a portable platform, unlike Papetti for the above-mentioned reasons on Pages 9-11.

Moreover, Dependent Claims 37-41 and 43-44, which directly or indirectly depend from Independent Claim 36, have the following additional distinguishing aspects: Claim 37 (filler material is expanded polystyrene foam), Claim 38 (filler material is encapsulated in fabric wrapper), Claim 39 (fabric is propylene yarn), Claim 40 (filler material in at least one of the gabion compartments is in the form of a single block), Claim 41 (at least one of the gabions is a mattress gabion), Claim 43 (at least one of the panels is either wood or metal or a combination thereof), which all directly or indirectly depend from Independent Claim 36, have the following additional distinguishing aspects: Claim 28 (filler material is expanded polystyrene foam); Claim 29 (filler material is encapsulated in a fabric wrapper); Claim 30 (fabric wrapper is

polypropylene yarn); Claim 31 (filler material in at least one of the gabion compartments is in the form of a single block); Claim 32 (the gabion is a mattress gabion); Claim 34 (at least one of the panels is either a wood or metal panel or a combination thereof); and, Claim 35 (at least some of the panels are interlockable with one another).

Additionally, to further distinguish Appellant's Claims 45-46 as rejected by the Examiner in view of 35 U.S.C. §103(a), Appellant respectfully emphasizes that: Independent Claim 45 is directed to a portable roadway or platform, unlike Papetti for the above-mentioned reasons.

Accordingly, the use of Papetti as a primary reference in view of 35 U.S.C. §103(a) was improper; further, the rejection of Claims 27-32, 34-41, and 43-46 based on Papetti was therefore unfounded as demonstrated by the above discussion.

35 U.S.C. §103 - Taguchi
Claims 27-32, 34-41, and 43-46

The Examiner has improperly relied on this prior art reference under 35 U.S.C. §103 due to his misunderstanding of the word “ballast” and misapplication thereof in view of Appellant’s disclosed and claimed invention and the prior art references, including Taguchi (provided herewith as Appendix B). For the sake of reference, Appellant provides Appendix C herewith which provides the dictionary definition of “ballast” and therefore the well-accepted meaning of this term. In sum, the Examiner has mischaracterized Appellant’s disclosed and claimed invention as utilizing ballast material (whereas Appellant’s specification expressly refers to buoyant material having a density less than that of water) *and* relies upon the prior art references, including Taguchi, which refer to *ballast* material.

Invention Distinguished from Taguchi

First, the Examiner has mischaracterized Appellant’s disclosed and claimed invention as involving ballast material as Appellant’s specification does not expressly or implicitly refer to *ballast* material – however, it does disclose and claim *buoyant* material having a density less than water (including Independent Claims 27 (and Dependent Claims 28-35), 36 (and Dependent Claims 37-44), and 45

(and Dependent Claim 46)). Further, the Appellant's use of the language 'buoyant material having a density less than water' is more accurately characterized as being the opposite in meaning of *ballast* material (which, according to the dictionary definition of "ballast" as listed in Appendix C, refers to "a heavy substance placed in such a way as to improve stability and control" and "gravel or broken stone.")).

Second, as even disclosed in Appendix D -- US Patent No. 5,636,938 to Ragazzo ("Ragazzo") -- prior art which the Examiner himself has relied upon, the term "ballast" means "hard durable material" (col. 1, line 18), such as "stone or gravel" or "slag or broken concrete" (col. 1, lines 37-38). As can be seen by these provided examples, these ballast materials are not akin to, for example, Appellant's filler material having a density less than that of water (e.g., expanded polystyrene foam). To further differentiate this point, Ragazzo further explains, "[t]he main property of ballast is that the material be of sufficient weight to act as ballast." This physical property of ballast is likewise not akin to Appellant's invention which requires filler material "having a density less than water" as per the above-mentioned Claims.

Accordingly, the use of Taguchi as a secondary reference in view of 35 U.S.C. §103(a) was improper; further, the rejection of Claims 27-32, 34-41, and 43-46 based on Papetti in view of Taguchi was therefore unfounded as demonstrated by the above discussion.

Inapplicability of Taguchi

Taguchi (the reference of which is provided as Appendix B) provides for the use of "*fiber reinforced foamed materials*" (see abstract; emphasis added) in the gabion system. This is not -- as Examiner states and/or otherwise implies -- a characteristic of filler material (such as that of Appellant's) *having a density less than that of water* such as, for example, expanded polystyrene foam itself. Rather, Taguchi teaches a method and apparatus, both of which comprise a "foamable material...with the composite fibers or composite yarns...so as to reinforce the foamed body." See Taguchi (abstract; col. 3 lines 4-23; col. 3 lines 30-38; col. 9 lines 63-68; and, col. 10 lines 1-49). In contrast, Appellant's instant invention discloses and claims filler material having density less than that of water such as, for example, expanded polystyrene foam.

Moreover, Taguchi's utilization of a *fiber-reinforced* foamable material teaches away from Appellant's use of, for example, expanded polystyrene foam or some other material having a density less than that of water (as discussed in more detail above).

Accordingly, the use of Taguchi as a secondary reference in view of 35 U.S.C. §103(a) was improper; further, the rejection of Claims 27-32, 34-41, and 43-46 based on Papetti in view of Taguchi was therefore unfounded as demonstrated by the above discussion.

- B.** The rejection of Claims 33 and 42 under 35 USC 103(a) over U.S. Patent No. 4,726,708 to Papetti in view of U.S. Patent No. 5,200,261 to Taguchi et al., and in further view of U.S. Patent No. 5,636,938 to Ragazzo is contested.

The Examiner has rejected Dependent Claim 33 (which directly depends from Independent Claim 27) and Dependent Claim 42 (which directly depends from Independent Claim 36) under 35 U.S.C. §103(a) as being unpatentable over Papetti in view of Taguchi and in further view of Ragazzo.

Inapplicability of Ragazzo

Ragazzo is directed to the art of traditional gabion systems with ballast material. The reference is provided herewith as Appendix D. "The [Ragazzo] invention relates broadly to the art of Gabion Systems." (See Ragazzo, col. 1, line 5.) "Gabion Systems are containers or cages filled with ballast." (See Ragazzo, col. 1, line 16 (emphasis added).) Because the Ragazzo reference is directed to *ballast material* and is therefore an inapplicable reference in view of 35 U.S.C. §103(a) since Appellant's disclosed and claimed invention does *not* utilize ballast material, but rather *buoyant* material having a density less than that of water. In consideration of this distinguishing aspect, the Examiner's reliance on Ragazzo which uses polyvinyl chloride ("PVC")-coated gabions (similar to that of Appellant's) is not founded (as Ragazzo is directed to ballast material whereas Appellant's disclosed and claimed invention is directed to non-ballast material).

Moreover, even Ragazzo, alone, would not disclose essentially all or actually all that is claimed. Similar to the above discussion of Papetti and Taguchi, Ragazzo does not teach, suggest, or provide the motivation to provide for a portable platform or a

portable roadway. Moreover, also similar to the limitations of these two cited references, Ragazzo does not utilize a lightweight (i.e., non-ballast) material in its gabion system; instead, Ragazzo utilizes *ballast* material. As explained, ballast material is *not* utilized in Appellant's invention; rather, filler material having a density less than that of water such as, for example, expanded polystyrene foam, is used.

Finally, in light of the distinguishing features of Dependent Claim 33 (which directly depends from Independent Claim 27) and 42 (which directly depends from Independent Claim 36), as discussed above (see, esp., the above Papetti discussion) over the Papetti, Taguchi, and Ragazzo references, Appellant respectfully requests that these Claims be allowed.

Accordingly, the use of Ragazzo as a tertiary reference in view of 35 U.S.C. §103(a) was improper; further, the rejection of Claims 27-46 based on Papetti in view of Taguchi and further view of Ragazzo was therefore unfounded as demonstrated by the above discussion.

CLOSING

For the reasons set forth above, the rejections of Claims 27-46 are improper and should be reversed.

Respectfully Submitted,



Lee Kim, Esq.
USPTO Reg. No. 53,125
January 11, 2007
(412)594-3915

CLAIMS APPENDIX

List of Claims: Claims 27-46 are appealed.

Claims 1-26 (cancelled).

Claim 27 (amended): A portable roadway comprising:

a) a support layer having a wire mesh top surface, wherein said surface defines at least one closed gabion, and said support layer comprising a plurality of wire mesh gabions, each of said gabions having a plurality of compartments, each of said compartments being substantially full of a filler material having a density less than that of water; and

b) a traffic layer supported by said top surface, said traffic layer comprising a plurality of panels, ~~each of said panels being removably placeable onto on~~ said top surface, wherein said panels are removeable;

wherein said portable roadway has sufficient strength to support construction vehicle traffic.

Claim 28 (previously presented): The portable roadway of claim 27, wherein said filler material is expanded polystyrene foam.

Claim 29 (previously presented): The portable roadway of claim 27, wherein said filler material is encapsulated in a fabric wrapper.

Claim 30 (amended): The portable roadway of claim 29, wherein the fabric wrapper is polypropylene yarn.

Claim 31 (previously presented): The portable roadway of claim 27, wherein said filler material in at least one of said compartments is in the form of a single block.

Claim 32 (previously presented): The portable roadway of claim 27, wherein at least one of said gabions is a mattress gabion.

Claim 33 (previously presented): The portable roadway of claim 27, wherein the wire mesh of at least one of said gabions is coated with polyvinylchloride.

Claim 34 (amended): The portable roadway of claim 27, wherein at least one of said panels is selected from the group consisting of wood panels, ~~and metal panels~~, and a combination thereof.

Claim 35 (previously presented): The portable roadway of claim 27, wherein at least some of said panels are interlockable with each other.

Claim 36 (previously presented): A portable platform comprising:

- a) a support layer having a top surface, said support layer comprising a plurality of wire mesh gabions, each of said gabions having a plurality of compartments, each of said compartments being substantially full of a filler material having a density less than that of water; and
- b) a traffic layer supported by said top surface, said traffic layer comprising a plurality of panels, each of said panels being removably placeable onto said top surface; wherein said portable platform has sufficient strength to support construction vehicle traffic.

Claim 37 (previously presented): The portable platform of claim 36, wherein said filler material is expanded polystyrene foam.

Claim 38 (previously presented): The portable platform of claim 36, wherein said filler material is encapsulated in a fabric wrapper.

Claim 39 (amended): The portable platform of claim 38, wherein the fabric wrapper is polypropylene yarn.

Claim 40 (previously presented): The portable platform of claim 36, wherein said filler material in at least one of said compartments is in the form of a single block.

Claim 41 (previously presented): The portable platform of claim 36, wherein at least one of said gabions is a mattress gabion.

Claim 42 (previously presented): The portable platform of claim 36, wherein the wire mesh of at least one of said gabions is coated with polyvinylchloride.

Claim 43 (amended): The portable platform of claim 36, wherein at least one of said panels is selected from the group consisting of wood panels, ~~and metal panels,~~ and a combination thereof.

Claim 44 (previously presented): The portable platform of claim 36, wherein at least some of said panels are interlockable with each other.

Claim 45 (amended): A method for constructing a portable roadway or a portable platform comprising the steps of:

- a) providing a plurality of multi-compartment wire mesh gabions;
- b) providing a plurality of movable panels;
- c) providing a filler material having a density less than that of water;
- d) filling the compartments of at least some of said gabions to substantial fullness with said filler material;
- e) assembling said gabions to form a support layer having a top surface; and
- f) placing said plurality of movable panels onto said top surface to form a traffic layer so that said support layer and said traffic layer interact to form at least one selected from the group consisting of a said portable roadway and a said portable platform;

wherein each of said portable roadway and each one of said portable platform have sufficient strength to support construction vehicle traffic.

Claim 46 (previously presented): The method of claim 45, further comprising the steps of:

- a) providing a fabric wrapper for said filler material;
- b) selecting at least a portion of said filler material to be expanded polystyrene foam; and
- c) encapsulating said expanded polystyrene foam within said fabric wrapper prior to placing said expanded polystyrene foam into one of said compartments.

RELATED PROCEEDINGS APPENDIX

There are no prior or pending appeals, interferences or judicial proceedings relating to this appeal, or which may directly affect, or be directly affected by, or having a bearing on, the Board's decision in this appeal.

EVIDENCE APPENDIX

Table of Contents.

Appendix A: U.S. Patent No. 4,726,708 to Papetti, February 23, 1988

Appendix B: U.S. Patent No. 5,200,261 to Taguchi et al., April 6, 1993

Appendix C: Definition of “ballast” – Merriam Webster Online Dictionary *available at*
<<http://www.m-w.com>>, last accessed 12-17-06

Appendix D: U.S. Patent No. 5,636,938 to Ragazzo, June 10, 1997